WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4926

IN THE MATTER OF: Served September 12, 1996

Application to Transfer Certificate) Case No. AP-96-21
No. 250 from CAVALIER)
TRANSPORTATION CO., INC., Trading)
as TOURTIME AMERICA, LTD., to)
TOURTIME AMERICA MOTORCOACH, LTD.)

By application accepted for filing April 24, 1996, Cavalier Transportation Co., Inc., a Virginia corporation trading as Tourtime America, Ltd. (Cavalier or transferor), WMATC Carrier No. 250, and Tourtime America Motorcoach, Ltd., a Virginia corporation (TAML or transferee) (collectively applicants), seek Commission approval of TAML's purchase of substantially all the assets of Cavalier, including Cavalier's WMATC certificate of authority.

TAML is under common control with: Franklin Motorcoach, Inc. (FMI), WMATC Carrier No. 6; Gold Line, Inc., WMATC Carrier No. 14; and National Coach Works, Inc. (NCW), WMATC Carrier No. 26. TAML also is under common control with passenger carriers in Pennsylvania and Florida.

Notice of this application was served on April 30, 1996, in Order No. 4823. Applicants were directed to publish further notice in a newspaper and file an affidavit of publication and a statement addressing the effect of the agreement on competition, the riding public and the interests of affected employees. Applicants complied. The application is unopposed.

SUMMARY OF EVIDENCE

The application includes information regarding, among other things, transferee's corporate status, carrier affiliations, facilities, proposed tariff, finances, and regulatory compliance record. Also included is a copy of the Asset Purchase Agreement executed February 22, 1996.

Under the purchase agreement, Cavalier agrees to sell, and TAML agrees to buy, substantially all the assets of Cavalier, including Certificate of Authority No. 250. TAML will retain the employees of Cavalier, including top management.

TAML proposes a general tariff containing the same rates and regulations as those in Cavalier's current general tariff.

TAML certifies it has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire.

DISCUSSION AND CONCLUSION

Under Article XI, Section 11(a), and Article XII, Section 3(a)(ii), of the Compact, the Commission may approve the transfer of assets from Cavalier to TAML, including Certificate of Authority No. 250, if the Commission finds said transfer to be in the public interest. "The public interest is best reflected in the efficiency, quality, quantity, and price of service available to the public. These factors are generally believed to be a function of the effectiveness of competition in the marketplace."[1]

Up until the Compact was amended in 1990, effective in 1991, the public interest analysis in an application for Commission approval of consolidation, merger or acquisition of control focused on (1) the fitness of the acquiring party, (2) the fairness of the purchase price, (3) the resulting competitive balance (or effect on competition), (4) any dormancy of operating rights, (5) the benefits to the riding public, and (6) the interest of affected employees.[2] The Commission's decision In re Boston Coach-Wash. Corp., No. AP-96-21, Order No. 4163 (Sept. 13, 1993), reduced the number of public interest factors from six to four. As explained in that decision:

> The dormancy inquiry was a means of guarding against the transfer of operating rights which had fallen into such disuse as to no longer serve a public need. The purchase price inquiry was necessary to prevent the transferee from passing exorbitant acquisition costs on to captive customers in the form of rate increases. Public necessity and ratemaking issues are no longer relevant concerns under the amended Compact.

Order No. 4163 at 2-3.

Since Order No. 4163, the benefits-to-the-riding-public inquiry while fine in theory has proven to be less than rigorous in practice. Many of our decisions since then have found a public benefit on the basis of the potential for increased competition,[3] which in essence

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[1] GLI Acquisition Co., 1988 Fed. Car. Cas. (CCH) ¶ 37,470 at 47,249, 1988 WL 226400 at *7 (I.C.C. May 27, 1988).

[2] In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4642 (Aug. 9, 1995); In re Carey Limo. D.C., Inc., & ADV Int'l Corp., t/a Moran Limo. Serv., No. AP-94-53, Order No. 4499 (Feb. 16, 1995); In re Executive Sedan Mgmt. Servs., Inc., t/a Washington Car & Driver, No. AP-94-26, Order No. 4354 (Aug. 1, 1994); In re WestScot Ltd. Partnership & Conference Ctr. Interests, Inc., t/a Westfields Int'l Conference Ctr., No. AP-93-24, Order No. 4175 (Sept. 30, 1993); In re Boston Coach-Wash. Corp., No. AP-93-21, Order No. 4163 (Sept. 13, 1993).

[3] E.g., In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4642 (Aug. 9, 1995); In re Capital City Transp. Co., No. AP-95-10, Order No. 4553 (Mar. 31, 1995); In re Capital City Limo., Inc., No. AP-95-09, Order No. 4552 (Mar. 31, 1995); In re Yellow Bus Serv., Inc., t/a Yellow Transp., No. AP-94-44, Order

duplicates the effect-on-competition finding. The remainder have simply held that the public benefits were self-evident and established at the time the retiring carrier obtained its operating authority.[4] In other words, continuation of an existing service was per se consistent with the public interest. It thus appears this element of the analysis is an unnecessary holdover from our public-convenience-and-necessity past. It does not add anything meaningful to the mix under contemporary standards. Accordingly, it will be eliminated as an element of the public interest determination under Article XII, Section 3, of the Compact.

Henceforth, we retain fitness, the effect on competition, and the effect on the interests of affected employees as the factors to be considered when deciding an application under Article XII, Section 3. Retaining fitness as a factor will prevent unfit persons from obtaining indirectly through consolidation, merger or acquisition of control what they could not obtain directly by applying for a certificate of authority. We retain the "effect on competition" factor because, as indicated above, we believe it is one of the best measures of whether such a transaction is in the public interest. We are statutorily constrained by Section 3 of Public Law No. 86-794,[5] the 1960 congressional consent legislation, to consider the effect of mergers and acquisitions on the interests of affected employees.[6]

We have said in the past that the prospect of commonly controlled carriers possessing overlapping authority calls for heightened scrutiny with regard to the effect on competition.[7] By this we mean that consolidations, mergers, and acquisitions of control which tend to increase a carrier's share of the market in the Metropolitan District -- or such market share of those controlling a carrier -- should be scrutinized for signs of anticompetitive effect; transactions which do not increase market share in the Metropolitan District give us little pause for concern.[8] We may safely approve

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No. 4434 (Nov. 9, 1994).

[4] E.g., In re Shaw Bus Serv., Inc., & National School Bus Serv., Inc., No. AP-95-32, Order No. 4638 (July 24, 1995); In re Williams Bus Lines, Inc., & Laidlaw Transit (Virginia) Inc., No. AP-94-17, Order No. 4316 (June 9, 1994).

[5] Act of Sept. 15, 1960, Pub. L. No. 86-794, § 3, 74 Stat. 1031 (1960).

[6] The statute, as codified, provides in pertinent part "that the term 'public interest' as used in § 3(c) of Article XII, Title II of the Compact shall be deemed to include, among other things, the interest of the carrier employees affected." D.C. CODE ANN. § 1-2414 (1992).

[7] E.g., In re Executive Sedan Mgmt. Servs., Inc., t/a Washington Car & Driver, No. AP-94-26, Order No. 4354 (Aug. 1, 1994).

[8] Compare In re Greyhound Corp. & Airport Transport, Inc., No. 195, Order No. 951 (June 4, 1969) (reporting conditions imposed to insure against WMATC parent leveraging FAA contract monopoly to undue benefit of WMATC sightseeing subsidiary) with In re Metro Access of Md. Inc., No. AP-94-07, Order No. 4284 (Apr. 26, 1994) (applicant for

even those transactions which tend to increase market share as long as there is sufficient intermodal and/or intramodal competition to check any anticompetitive effects that such transactions otherwise might produce.

We take this opportunity to eliminate consideration of the so-called Red Top factors in overlapping authority applications. Prior to the 1990 Compact amendments, we had held that the potential reasons for prohibiting commonly controlled carriers from holding duplicative authority were:

> (1) concern for promoting corporate simplification; (2) the possibility of unfair competition and unjust discrimination and preferences as to rates and practices; (3) the possible adverse effects on competition if commonly controlled carriers are able to sell one right while retaining another to perform identical operations; and (4) the concern that grants of valuable motor carrier operating rights may be used improperly for personal gain through their sale rather than for their true purpose of providing necessary services to the travelling public.

In re Red Top Coach, Inc., & National Coach Works, Inc., No. AP-84-45, Order No. 2692 at 5 (Apr. 3, 1985).

After the 1990 Compact amendments, we noted that "[w]ith the advent of changes in the Compact promoting award of identical operating rights to multiple carriers the vitality of the Red Top factors has been greatly diminished -- if not extinguished."[9] Upon further reflection, we find that the Red Top factors have lost their usefulness. Today, relaxed entry standards force all carriers to streamline to the extent competitively necessary. Price discrimination can and should be addressed in a complaint proceeding or investigation under Article XI, Section 16, of the Compact. We examine the effects on competition in the course of discerning whether approving common control would be consistent with the public interest. There is no intrinsic value in operating rights under a certificate of authority. In short, we dispense with the Red Top analysis as unnecessary and duplicative of the public interest inquiry under Article XII, Section 3, of the Compact.

In this case, the three public interest factors favor approval. First, a presumption of fitness arises where the acquiring party controls another WMATC carrier previously found fit,[10] and there is

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new certificate affiliated with non-WMATC carriers only; approval should not result in any consolidation of market power); In re Peter Pan Bus Lines, Inc., No. AP-93-19, Order No. 4149 (Aug. 11, 1993) (same).

[9] Order No. 4354.

[10] Order No. 4354. In this case both TAML and its controlling shareholder may be properly considered as the acquiring party. TAML is acquiring Cavalier's assets, and TAML's controlling shareholder is acquiring control of those assets. Furthermore, we have previously

nothing in this record to rebut that presumption. Second, we find that approving common control of TAML, FMI, Gold Line and NCW likely will have little or no adverse impact on competition in the Metropolitan District. We reached the same conclusion in the FMI proceeding on the basis of evidence showing that each company is operated independently of the others, that there is no regional manager and that each company has its own General Manager, whose performance is measured by that company's financial results at the end of the year.[11] As we held in that proceeding, "the independent nature of the . . . companies' day-to-day operations and existence of over 80 WMATC carriers authorized to operate coaches, many of which have filed general tariffs for charter service in such vehicles, should ensure little or no adverse impact on competition in the Metropolitan District."[12] In other words, intra-brand and inter-brand competition are sufficient to offset any anticompetitive effects which might flow from common control of these four WMATC carriers. Third, Cavalier's employees will continue to be employed in their current positions.

Accordingly, based on the evidence in this record, the Commission finds the transfer of assets, including Certificate of Authority No. 250, from Cavalier to TAML consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That the transfer of assets, including Certificate of Authority No. 250, from Cavalier to TAML is hereby conditionally approved, contingent upon TAML's timely compliance with the requirements of this order.

2. That TAML is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 250 is hereby reassigned.

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held, in the context of a newly created carrier's application for a certificate of authority, that finding such an applicant fit permits an inference of the controlling shareholder's fitness. E.g., Orders Nos. 4642; 4553; 4552; 4434. We believe the reverse holds true, as well, i.e., TAML's fitness may be inferred from a finding that its controlling shareholder is fit.

[11] In re Franklin Charter Bus, Inc., & Franklin Motorcoach, Inc., No. AP-95-02, Order No. 4509 (Mar. 1, 1995).

[12] Id.

3. That upon timely compliance with the requirements of the preceding paragraph and acceptance of the documents required by the Commission, Certificate of Authority No. 250 shall be reissued to Tourtime America Motorcoach, Ltd., 10291 Sliding Hill Road, Ashland, VA 23005.

4. That unless TAML complies with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the approval of transfer shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND MILLER:

William H. McGilvery
Executive Director